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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 233.

NAOMI PETTY, Administratrix of the Estate of
FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
a Corporation,
Respondent.

RESPONDENT'S OPPOSING BRIEF TO GRANTING
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

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STATEMENT OF ADDITIONAL FACTS.

1—Petition for Certiorari does not fully set out the reasons^s contained in Motion to Dismiss on account of im-

munity for tort action. See Record page 7, wherein it is alleged that Respondent Commission is an immediate agency and arm of the sovereign states of Tennessee and Missouri whose sole powers and duties are to plan, construct, maintain and operate a bridge at or near Caruthersville and ferries across the Mississippi River within a radius of twenty-five miles of Caruthersville, Missouri, as an agency of Tennessee, Missouri and the United States, and pay for the same by tolls, and the title thereto to become vested in the states of Tennessee and Missouri when the costs thereof have been paid.

2—Attached to the foregoing Motion to Dismiss on account of immunity for tort action was an affidavit of the Secretary and General Manager of Respondent Commission (Record page 9). Among other things the following is set up in said affidavit:

(a) Par. 5 of the affidavit alleges that Respondent Commission had entered into a contract with the Secretary of the Treasury of the United States in which the status of Respondent Commission as a governmental agency was recognized and that the interest income on all of the bonds which might be issued by said Commission would be exempt from federal income taxes.

(b) In Par. 6 of the affidavit it was alleged that Tennessee, Missouri and the United States had allocated the sum of \$100,000.00 to Respondent Commission for the uses and purposes enjoined upon the Commission by the acts of the legislatures aforesaid and the act of Congress, and approximately \$48,000.00 of said allocation had been expended under the orders of Respondent Commission.

(c) In Par. 7 of the affidavit it was alleged that pursuant to the powers and duties enjoined upon the Commission by the legislative acts the Commission had purchased and acquired title to the Tiptonville

Ferry being the instrumentality upon which deceased lost his life, and Respondent Commission had by resolution approved and issued its revenue tax free bonds in the amount of \$200,000.00 bearing interest at the rate of 5% per annum for the purpose of paying the purchase price of the ferry, and that the sum of \$180,000.00 of said bonds were still outstanding and unpaid, and all of the ferry property and the income therefrom was pledged to secure the payment of said revenue bonds and the interest accruing thereon.

(d) In Par. 8 of the affidavit it was alleged that Respondent Commission had at no time transacted any business except that which it was authorized to transact by the legislative acts aforesaid.

3—In the trial of this case in the District Court evidence was introduced in support of all of the matters of fact set out in the Motion to Dismiss as well as in the affidavit annexed thereto, and Petitioner offered no evidence to the contrary. See printed Record page 12.

REASONS TO DISALLOW WRIT.

1—There is no special or important reason why Writ should issue (Rule 19), and no principle of public importance is involved in this private action instituted by Petitioner.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 99 L.ed. 897, 75 S.Ct. 614.

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 67 L.ed. 712, 43 S.Ct. 422.

2—The decision of the District Court (153 F.Supp. 512), as well as the Court of Appeals (254 F.2d 857), is in harmony with other Federal Court decisions. Petitioner does not claim a conflict.

3—The opinion of the Court below follows *Ex parte State of New York*, 256 U.S. 490, 65 L.ed. 1057, the last controlling decision of this Court on governmental immunity in maritime tort. The opinion is also in harmony with *Ex parte State of New York*, 256 U.S. 503, 65 L.ed. 1063. *United States v. California*, 297 U.S. 175, 80 L.ed. 567, has no application here for the reason this is a suit by an individual against an agency of the sovereign.

4—The Acts creating the Respondent Commission giving it the capacity "to sue and be sued" is not a waiver of governmental immunity for tort action.

Todd v. University of Missouri, 347 Mo. 460, 147 SW2d 1063.

State v. Cook, 106 SW2d 858 (Tenn.).

ARGUMENT.

I.

Reasons to Disallow Writ.

1—There is no special or important reason why the decision of the lower court in this case should be reviewed. There is no claim that the decision of the Court of Appeals is in conflict with any other Court of Appeals, and Petitioner admits that the decision of the lower Court is in harmony with the last controlling decision of this Court.

In the recent decision of this Court in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 99 L.ed. 897, you quoted with approval the following from *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387:

"If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very

important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

2—As to the immunity of a state for maritime tort we take the following quotation from *In re The State of New York*, 256 U.S. 490 (65 L.ed. 1c. 1063):

"There is no substance in the contention that this result enables the state of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law insisted upon in *Workman v. New York*, 179 U.S. 552, 557-560. * * * The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law (503) as a body of substantive law, operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. *Chelentix v. Luckenbach S. S. Co.*, 247 U.S. 372, 382, 384, 62 L.ed. 1171, 1175, 1176, 38 Sup. Ct. Rep. 501. It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the Courts of admiralty and maritime jurisdiction.

The want of authority in the District Court to entertain these proceedings in personam under Rule 59 (now 56), brought by the claimants against Mr. Walsh as superintendent of public works of the State of New York, is so clear, and the fact that the proceedings are in essence suits against the state without its consent is so evident, that instead of permitting them to run their slow course to final decree, with in-

evitable futile result, the writ of prohibition should be issued as prayed."

We also call the attention of the Court to another opinion of this Court, *Ex parte State of New York*, 256 U.S. 503, 65 L.ed. 1.c. 1066, where this Court stated:

"The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt public property of a state, used and employed for public and governmental purposes.

Upon the facts shown, the Queen City is exempt, and the prohibition should be issued.

Rule absolute for a writ of prohibition."

II.

Respondent Commission Is a Governmental Agency.

The Commission is an agency or instrument of the States of Tennessee and Missouri and is not an entity separate and apart from the states. The Commission has no capital stock, and is controlled by state officials appointed by the respective Governors with Senate confirmation. Veto power was reserved to the Governors. The Commission is authorized to issue bonds exempt from income taxes. Its revenue from tolls can only be used for reasonable operating expenses and for payment of its bonds and interest, and when the indebtedness is paid the bridge is to belong to the two states and operated free of tolls. Its income is pledged exclusively for operating expenses and bond payments. The Commission was authorized by Legislative Acts to furnish the public with necessary highways and bridges which is a governmental function.

Respondent Commission is somewhat like the Port of New York Authority, which was created by New York and New Jersey with the approval of Congress, and which performs duties pertaining to harbors, bridge and tunnels connecting the two states. In *Howell v. Port of New York Authority*, 34 F. Supp. 795, the District Court, N. J., at l.c. 801, said:

"The Port Authority, a bi-state corporation * * * is a joint or common agency of the states of New York and New Jersey. It performs governmental functions which project beyond state lines, and it is immune from suit without its consent."

The decision in *Rao v. Port of New York Authority*, E.D.N.Y., 122 F. Supp. 595, which was affirmed in 222 F.2d 362, is to the same effect.

We do not find that there is a controlling decision of any Federal Court to the contrary.

III.

Power to Sue and Be Sued.

The Legislative Acts creating the Respondent Commission among other things provides that it shall have the following powers:

"3. To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property * * *."

There are numerous Acts of the Legislatures of the two States providing that various agencies, political subdivisions, etc., shall have the power to sue and be sued. These Acts were on the statute books at the time the Bridge Commission was set up, and had been for a great many years. Nevertheless, the Courts of Tennessee and

Missouri have held that these Commissions, agencies and political sub-divisions were immune from tort action. *Todd v. University of Missouri*, 347 Mo. 460, 147 SW2d 1063; *State v. Cook*, 106 SW2d 858, Tennessee.

In *Todd v. University of Missouri*, 347 Mo. 460, 147 SW2d 1063, l.c. 1064, Judge Clerk for the Supreme Court sufficiently answered this argument:

"A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence. '* * * But the waiver by the state for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity from liability for the torts of the officers or agents of the state is quite another thing.'" Citing many cases.

If the Legislatures of Tennessee and Missouri intended to give consent for the institution of tort actions against the Bridge Commission they would have done so in appropriate terms (See: Fed. Tort Claim Act, 28 U.S.C.A. 1346 and 2674). The authorization for this Commission to sue and be sued is limited to those contractual obligations which it is authorized to enter into, and there was no intent to authorize it to be sued in tort.

The rule of governmental immunity for tort actions to all sub-agencies, commissions, or corporations set up by the sovereign to perform governmental functions, such as the Respondent Commission here has been applied to all state agencies.

(a) In Missouri the State Highway Commission was set up by the Legislature to build and maintain highways throughout the state, and is an agency similar to the defendant Commission. The State Highway Commission is immune from suit for torts.

Bush v. State Highway Commission, 329 Mo. 843, 46 SW2d 854.

Hill-Behan Lbr. Co. v. Highway Commission, 347 Mo. 671, 148 SW2d 499.

(b) The various counties in the State of Missouri are immune from tort action.

Swineford v. Franklin County, 73 Mo. 279.

Zoll v. St. Louis County, 343 Mo. 1061, 124 SW2d 1168.

(c) Cities are immune from tort action growing out of matters connected with their governmental powers.

Richardson v. City of Hannibal, 330 Mo. 398, 50 SW2d 648, 84 A.L.R. 508.

(d) Organized townships in the various counties in the State of Missouri are immune from tort action.

Cullor v. Jackson Township, 249 SW2d 393 (Mo. Sup.).

(e) The various school districts in the State of Missouri are immune from tort action.

Meadow Park Land Co. v. School Dist., 301 Mo. 688, 257 SW 441.

Cochran v. Wilson, 287 Mo. 210, 229 SW 1050.

(f) The various colleges and universities in the State of Missouri, and which have boards and commissions to manage and control them, are immune from tort action.

Todd v. University of Missouri, 347 Mo. 460, 147 SW2d 1063.

(g) The various special road districts existing all over the State of Missouri are immune from tort action.

Sharp v. Kurth, 245 SW 636.

(h) Drainage and levee districts which are organized and controlled by local boards and supervisors are not liable in tort action.

State ex rel. v. Allen, 298 Mo. 448, 250 SW 905.

Kyle v. St. Francis Levee District, 153 SW2d 391.

Tant v. Little River Drainage District, 210 Mo. App. 420, 238 SW 848.

(i) This doctrine of immunity has been extended and applied to charitable institutions, even though the sovereign has nothing to do with them.

Dille v. St. Lukes Hospital, 196 SW2d 615, 355 Mo. 436.

Eads v. Y. W. C. A., 325 Mo. 577, 29 SW2d 701.

(j) This rule of immunity from tort action enjoyed by political sub-divisions and political corporations is applied in Tennessee.

Rogers v. Butler, 170 Tenn. 125.

Taylor v. Coble, 28 Tenn. App. 167, 187 SW2d 648.

Williams v. Morristown, 32 Tenn. App. 274, 222 SW2d 607.

City of Kingsport v. Lane, 243 SW2d 289.

The above is the rule in Tennessee and Missouri even though the Legislative Acts creating the agencies, commissions or corporations gave them the power to sue and be sued. See R. S. Mo. 1949, Sections 245.290, 233.025, 233.170, 226.100, 165.263, and 287.590.

CONCLUSION.

The opinion and decision of the United States Court of Appeals for the Eighth Circuit in this case cites numerous decisions from the various Federal Courts, State Courts and this Court in support thereof, and we urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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